SUPREME COURT, U. S.

AUG 23 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-347

PHILLIPS PETROLEUM COMPANY, a Corporation,
Petitioner,

vs.

TEXACO INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

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No. _____

PHILLIPS PETROLEUM COMPANY, a Corporation,
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TEXACO INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that this Court shall issue its writ of certiorari to review the judgment of the United States Court of Appeals, Tenth Circuit, entered July 13, 1973, in its action numbered 72-1758, styled Texaco Inc., Appellant v. Phillips Petroleum Company, Appellee, wherein and whereby a judgment of the United States District Court for the Northern District of Oklahoma, dismissing the said action for want of jurisdiction, was reversed.

OPINIONS BELOW

The District Court dismissed the action upon Petitioner's motion by order entered September 15, 1972. The order includes an opinion by the trial judge holding that the Court was without jurisdiction of the subject matter. It has not been published, but is reproduced at length as Appendix A to this petition.

The United States Court of Appeals for the Tenth Circuit reversed the dismissal by the District Court, with one judge dissenting. The opinions of the Court of Appeals have not yet been published. That of the majority is reproduced as Appendix B hereto, and the dissenting opinion is attached as Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 USC Sec. 1254(1), 62 Stat. 928. The opinions of the United States Court of Appeals for the Tenth Circuit were filed and entered on July 13, 1973. The action is of a civil nature. This petition is filed within ninety (90) days of July 13, 1973, as permitted by Title 28 USC Sec. 2101(c), 63 Stat. 104. Petitioner has requested the clerk of the Court of Appeals to certify and transmit the record to this Court in the manner provided by Rule 21 of the Rules of this Court.

QUESTIONS PRESENTED

As there is no diversity of citizenship between the parties, the ultimate question presented by this petition is:

1. Did the District Court have jurisdiction of the subject matter of respondent's claim under the provisions of Title 28 USC Sec. 1331(a), 72 Stat. 415?

Subsidiary to the ultimate question so stated, but necessary to its resolution, the following additional questions are presented for consideration:

2. Does a claim for recovery of the reasonable value of the helium constituent of natural gas sold for transmission in interstate commerce arise under the Constitution, laws, or treaties of the United States?

3. Does the circumstance that the Helium Act Amendments of 1960, Title 50 USC Secs. 167-167n, 74 Stat. 922, exclude helium from the regulatory powers of Federal Power Commission under the Natural Gas Act, Title 15 USC Secs. 717-717w, alter the character of a claim for the reasonable value of helium delivered and received from a common law assumpsit to a Federal right arising under the laws of the United States?

4. Is Respondent's appeal to the Natural Gas Act, and to the Helium Act Amendments of 1960 made in anticipation of or in reply to an anticipated defense within the rule of *Gully* v. *First National Bank of Meridian*, 299 U.S. 109?

STATUTES INVOLVED

The statute primarily involved in the decision of which review is sought is Title 28 USC Sec. 1331(a), 72 Stat. 415, relating to jurisdiction of the District Courts of the United States, which is as follows:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Also involved in the opinions below, and in an antecedent opinion relied upon by Respondent, is Section 11 of the Helium Act Amendments of 1960 (50 USC Sec. 167i, 74 Stat. 922) the full text of which follows:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

Incidentally concerned in the decision sought to be reviewed are the regulatory provisions of the Natural Gas Act, which is Chapter 15B of Title 15 USC, comprising Sections 717 through 717w. These sections are lengthy and therefore are omitted at this point, but the provisions of Sections 717c and 717d, being the text significant to this proceeding, are reproduced as Appendix D hereto.

STATEMENT OF THE CASE

Both Petitioner, Phillips Petroleum Company, and Respondent, Texaco Inc., are corporations organized and existing under the laws of Delaware. Both engage generally in prospecting for, producing, transporting, refining and marketing oil and gas and their products.

Texaco Inc. produces natural gas from wells located upon leases of lands in the Texas and Oklahoma Panhandles. Phillips Petroleum Company purchases gas so produced by Texaco at the wellhead under contracts which provide for volumetric measurement of deliveries, and for payment at stipulated unit rates extended over volumes of the gross streams so delivered.

The natural gas delivered by Texaco and received by Phillips contains helium in small quantities in random mixture with other constituents such as methane, ethane, propane, butane, argon, sulphur, oxygen, hydrogen and nitrogen.

Texaco Inc., as a producer of natural gas, is a "natural gas company" subject to regulation as to its rates or charges under the Natural Gas Act. Its contracts with Phillips have been filed as rate schedules with the Federal Power Commission. Both Texaco and Phillips are identified by the Federal Power Commission as "independent producers" (18 CFR Sec. 154.91(a)).

After its purchase, Phillips gathers the Texaco gas, commingles it with large quantities of gas either produced by Phillips or purchased from others, and transports the same to one or more processing plants where various fractions thereof are removed, concentrated and sold separately. A portion of the Texaco gas is subjected to a process by which its helium constituent, together with

quantities of nitrogen, is separated, concentrated and sold to the United States, which utilizes the same in its helium conservation program. The residue of the gas stream remaining after removal of various of its fractions is sold and delivered by Phillips to interstate pipeline companies for transmission and resale in interstate commerce.

In 1971 the United States Court of Appeals, Tenth Circuit, rendered a decision in certain consolidated cases under the style *Northern Natural Gas Company, et al.* v. *Grounds, et al., and Socony Mobil Oil Co., Inc., et al.*, 441 F.2d 704. In this case it was decided that the rates or prices authorized by the Federal Power Commission to be paid for natural gas would not prevent or bar seller from recovering the reasonable value of the helium content of the gas processed for helium recovery. This Court declined to review the decision at 404 U.S. 951 and 1063. The gas sold by Texaco and processed by Phillips, which is the subject of the instant action, was not involved in the *Northern Natural Gas Company* decision, supra.

The instant action was commenced upon the complaint of Texaco that it had not been compensated for the helium constituent contained in gases delivered to Phillips and processed for helium recovery, and that it was entitled to have the reasonable value thereof in addition to sums already paid by Phillips. The *Northern Natural Gas Company* opinion, supra, was relied upon as manifesting that Phillips' anticipated plea of payment was unavailing, and that the claimed indebtedness remained unsatisfied.

The case was filed originally in the District Court of the United States for the Northern District of Oklahoma. Diversity of citizenship being absent, Texaco relied upon Title 28 USC Sec. 1331(a), 72 Stat. 415, and asserted that its claim arose under the Constitution, laws or treaties

of the United States as the basis of Federal jurisdiction. There is no issue respecting sufficiency of the amount involved, which is substantially in excess of that required by the statute.

Thus, the case was one in which original jurisdiction was claimed to lie with the United States courts for the reason that the claim asserted was of a right granted or secured to Texaco by one or another law of the United States sufficient to satisfy the requirements of Section 1331(a), supra.

Phillips pleaded want of jurisdiction in its answer. Subsequently, at the direction of the trial court, Phillips proposed a motion to dismiss for want of jurisdiction of the subject matter, which the trial court sustained in the order and opinion contained in Appendix A.

ARGUMENT

Reasons Relied Upon for Allowance of the Writ

The review sought by this petition is limited to questions which address directly the limits of subject matter jurisdiction of the United States District Courts. The opinion of the Court of Appeals expands such jurisdiction, when claimed as resting upon a Federal question, beyond limits recognized by controlling decisions of this Court. Consideration by this Court of any significant expansion of original jurisdiction of civil actions by the courts of the United States is of the utmost importance.

Two Federal statutes are relied upon by the Court of Appeals as creating a cause of action within the jurisdiction of the United States District Courts. The first of these, the Natural Gas Act, 15 USC Secs. 717-717w, is a broad regulatory statute which authorizes the Federal Power Commission (FPC) to regulate the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale. The second, Section 11 of the Helium Act Amendments of 1960, 50 USC Sec. 167i, limits the jurisdiction granted the FPC under the Natural Gas Act by denying to the FPC authority to regulate helium contained in natural gas. Neither statute on its face purports to establish a cause of action in favor of any party nor specifically grants to any party the right to invoke the jurisdiction of the United States District Courts.

Lacking express grant of authority, the Court of Appeals has created a private cause of action out of the prohibition against assertion of public regulatory authority. The sole basis for this is the conclusion by the same Court of Appeals in *Northern Natural Gas Company, et al.* v.

Grounds, et al., supra, that the Natural Gas Act is not a bar to recovery by plaintiffs such as Texaco because Section 11 of the Helium Act Amendments of 1960 establishes that FPC rate regulation may not apply to helium. In substance, the Court of Appeals has determined that these two negatives create a positive and that the positive so created is a cause of action arising under the laws of the United States.

As noted by the Court of Appeals, ". . . there are over 30,000 persons receiving income from helium-bearing natural gas produced by over 500 lessee producers under thousands of leases" (Appendix B, pages A9-A10). Under the rationale of the Court of Appeals, most if not all of these now have a cause of action justiciable in the United States District Courts without regard to citizenship. Indeed, on the strength of this decision, Cities Service Oil Company, a Delaware corporation with its principal place of business in Oklahoma, has recently filed a similar suit in the United States District Court for the Northern District of Oklahoma against Petitioner, which is also a Delaware corporation with its principal place of business in Oklahoma.[1]

How many additional private causes of action may arise out of other Federal regulatory statutes and therefore within the jurisdiction of the United States District Courts is impossible to comprehend. Under the reasoning of the Court of Appeals, whenever a Federal regulatory statute has been limited or even affected by another statute, a private cause of action may arise under the laws of the United States because of the necessity to reconcile these two statutes. By this logic, it is of no concern whether Congress intended or even desired to create a private cause of action—if the reconciliation of the two statutes

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1. *Cities Service Oil Company* v. *Phillips Petroleum Company*, No. 73-C-230, United States District Court, Northern District of Oklahoma.

touches the affairs of private parties, any dispute arising therefrom is within the jurisdiction of the United States District Courts.

This vast expansion of Federal jurisdiction is both unnecessary and erroneous. It flows directly from the failure of the Court of Appeals to follow the plain mandate of four decisions of this Court, which are:

Metcalf v. *Watertown*, 128 U.S. 586 (1888);

Louisville and Nashville R. R. Co. v. *Mottley*, 211 U.S. 149 (1908);

Gully v. *First National Bank of Meridian*, 299 U.S. 109 (1936);

Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950).

Of less consequence is the failure of the Court of Appeals to follow three of its own previous opinions. See *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900 (1947); *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F.2d 767 (1963); and *State ex rel. Wilson* v. *Blankenship, et al.*, 447 F.2d 687 (1971).

As we are instructed by the opinion of this Court in *Gully* v. *First National Bank of Meridian*, 299 U.S. 109 at page 112 (1936):

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. * * * The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

The same opinion warns further:

> "* * * and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. * * * Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond the statement of the plaintiff's cause of action and *anticipates or replies to a probable defense.*" (Emphasis added)

Thus, it is imperative that the Texaco claim assert and exemplify a right or immunity granted by Federal law. It does not do so. It rests upon these operative facts:

(1) Texaco produces natural gas which contains a small constituent of helium in random mixture with other elements and compounds.

(2) Texaco formally contracted to sell and Phillips contracted to buy the gross unprocessed natural gas so produced.

(3) Texaco has delivered, and Phillips has measured, received and paid for the gross unprocessed natural gas so produced pursuant to the contract of sale.

(4) Texaco was required by the provisions of the Natural Gas Act to file and did file the contracts of the parties with Federal Power Commission as its rate schedule governing sale of the subject gas, portions of which were for transmission and resale in interstate commerce.

(5) In 1971, in a case which did not involve the contracts or the gas concerned in the case at bar, the United States Court of Appeals, Tenth Circuit, decided that the FPC had no jurisdiction over helium,

whether separate or entrained, and that payments made at rate schedules fixed by the FPC for the sale of natural gas did not include payment for helium contained in gas streams subject to its jurisdiction. (*Northern Natural Gas Company, et al.* v. *Grounds, et al.*, 441 F.2d 704 (10 Cir. 1971)).

Upon these facts Texaco claims that it has delivered to Phillips a commodity of value for which it has not been compensated. Whether such a claim arises upon the contract of the parties, or upon an implied contract, or upon an assumpsit at the common law is not really material. It is quite obvious that the right of its claim to be compensated for helium is not granted by any of the Constitution, laws or treaties of the United States but is a simple claim of indebtedness, satisfaction of which must respond to the dictates of the common law. Petitioner believes that the Texaco claim is in *indebtitatus assumpsit* as did the dissenting judge of the Court of Appeals.

However, the Texaco complaint pleads the Helium Act Amendments of 1960, the Natural Gas Act and the precedent of the *Northern Natural Gas Company* case in various contexts. Its Amended Complaint states that the Federal question involved in the case is the construction of the two Federal statutes concerning which the parties are alleged to be in genuine dispute or controversy.[2]

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2. The Complaint also alleges that the disposition of Texaco's claim will require the Court to construe the judgment of the Court of Appeals in the *Northern Natural Gas Company* case and that since Petitioner and Respondent were both parties to one or another of the actions included in that consolidated proceeding, Phillips is precluded by principles of res judicata, estoppel and stare decisis from denying liability for the value of the helium as prayed for in the Complaint. The Court of Appeals held that the necessity to construe the judgment did not support Federal jurisdiction (Appendix B, page A8) and did not reach the issue of res judicata (Appendix B, page A9).

There is undoubtedly a wealth of reference to the Federal statutes and to the Federal judgment in the Amended Complaint. But what is overlooked is that the context in which the same are pleaded is no part of the Texaco cause of action. References to the statutes and the cited judgment are made in each instance in anticipation and in bar of an expected *defense* by Phillips to the Texaco claim of debt. In effect, what Texaco pleads is that it expects Phillips to defend under a plea of payment. Texaco then pleads that the defense of payment will not avail to Phillips in view of the construction given the two Federal statutes by the judgment and opinion of the Court of Appeals for the Tenth Circuit. Mr. Justice Cardozo anticipated just this situation in his opinion in *Gully*, quoted above, when he noted that the averment of the complaint itself is of no avail insofar as it "anticipates or replies to a probable defense" (209 U.S. at page 113).

The opinion in *Northern Natural Gas Company*, pleaded by Texaco in an effort to suggest a Federal question, makes clear that the rule of its decision, and the construction given the two Federal statutes, operate simply to abate a defense to the Texaco claim which would otherwise exist. The court there said:

> "In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply *to deny recovery* for the contained helium which is processed in the separation plants." (Emphasis added) (441 F.2d at p. 723)

Thus, the Federal decision relied upon does no more than hold that Phillips may not defend a claim for the reasonable value of helium upon a plea that it had paid

the maximum sum permitted to be paid for the natural gas which contained it. Assertion of the *Northern Natural Gas Company* opinion by Texaco is no more than a position taken counter to and in anticipation of an expected defense.

In *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Tenth Circuit made the same error as is manifest upon the record here, and was reversed by this Court upon the authority of the cases cited above. The *Skelly Oil Co.* case involved a contract for the purchase or sale of natural gas, the effectiveness of which depended upon a construction of the Natural Gas Act, and an interpretation of the legal effect of certain actions of the Federal Power Commission. But the constructions and interpretations required bore upon the availability of a defense to an anticipated suit upon the gas purchase agreement, and, diversity being lacking, jurisdiction by reason of a Federal question was denied. The rule of decision again was that the plaintiff's claim did not arise under the Federal law, but rested in the contract law of the state concerned.

This Court's decisions in *Tennessee* v. *Union and Planters Bank*, 152 U.S. 454 (1894), and *Taylor* v. *Anderson*, 234 U.S. 74-76 (1914), are in accord with the above, but add nothing to the rule of the cases discussed.

We respectfully submit that the Tenth Circuit, in the instant case, has significantly enlarged the jurisdiction of the District Courts in plain disregard of the settled precedents of this Court.

CONCLUSION

Petitioner respectfully prays upon its petition, that this Court shall issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit directing that the instant case be forwarded for review, and that upon such review the order and judgment of the said Court of Appeals be reversed and the dismissal of this cause by the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 1973, three (3) copies of the foregoing petition for a writ of certiorari by Phillips Petroleum Company, together with all appendices attached, were mailed, first class postage prepaid, addressed to Philip R. Wimbish and Elmer W. Adams, attorneys of record for Respondent, Texaco Inc., properly addressed to said attorneys at their post office address in Tulsa, Oklahoma.

I further certify that all parties required to be served have been served.

Richard B. McDermott

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEXACO, INC., a corporation,
Plaintiff,
-vs-
PHILLIPS PETROLEUM COMPANY, a corporation,
Defendant.
Case No. 71-C-167

Order

Plaintiff sues Defendant for the value of helium entrained in natural gas produced by it and sold to the Defendant under gas contracts entered into between them. The circumstances surrounding the parties' controversy over the entrained helium which Defendant extracted from the natural gas obtained from Plaintiff are fully reported in *Northern Natural Gas Company* v. *Grounds,* 292 F. Supp. 619 (Kan. 1968) and *Northern Natural Gas Company* v. *Grounds,* 441 F. 2d 704 (Tenth Cir. 1971). The sole basis of jurisdiction herein as alleged by Plaintiff is the existence of a Federal question within the provisions of 28 U.S.C.A. § 1331(a). Defendant has moved to dismiss Plaintiff's action for lack of such jurisdiction.

The Amended Complaint of Plaintiff pleads as grounds for relief (1) the judgment of the United States Court of Appeals for the Tenth Circuit in the *Northern Natural Gas Company* case, supra, authorizing recovery of inter-

pleaded helium funds by lessee-producers, (2) common law assumpsit and (3) the rights afforded Plaintiff by the Natural Gas Act, 15 U.S.C.A. §§ 717 et seq., by § 11 of the Helium Act Amendments, 50 U.S.C.A. § 167i and by the judgment in the *Northern Natural Gas Company* case, *supra*. Plaintiff claims that grounds (1) and (3) *supra* are Federal questions which vest jurisdiction in this Court. Jurisdiction is clearly not present for a recovery under ground (2), *supra*, as Plaintiff acknowledges in its Brief, "there is no diversity of citizenship between the parties."

Jurisdiction is not present under ground (1), *supra*, as a judgment of a Federal court does not raise a federal question which will support jurisdiction under 28 U.S.C.A. § 1331(a). *Metcalf* v. *Watertown*, 128 U.S. 586, 32 L.Ed. 543 (1888); *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F. 2d 767 (Tenth Cir. 1963).

As to ground (3), supra, the Plaintiff, as a lessee-producer, did not acquire any rights under the provisions of the Natural Gas Act, 15 U.S.C.A. §§ 717 et seq. Rather, it lost rights as said Act placed a limitation or ceiling on the price Plaintiff, as a lessee-producer, could receive for the natural gas it produces and sells and otherwise subjected Plaintiff to rate regulation by the Federal Power Commission. The Natural Gas Act, *supra*, did not abrogate the gas contracts then existing between the parties hereto even though the price provisions thereof were superseded by Federal Power Commission rate regulation authorized by the Act. Nor, did Plaintiff acquire any rights under the Helium Act Amendments, § 11, 50 U.S.C.A. § 167i. They merely exempted extracted helium from the limitation or ceiling imposed by the Natural Gas Act. Thus, as Plaintiff obtained no rights under said Federal legislation, its rights herein cannot be said to *arise under* Federal law.

The foregoing observations are explicit in the Northern Natural Gas Company decision.[1] Therein the Court said,

> "The regulated lessee-producers must continue to sell the dedicated gas and have no *statutory* or contractual method of obtaining any benefit for the *increased value.*" (Emphasis added).

The "increased value", of course, is the helium content upon extraction. After allowing lessee-producers in said case to recover from the interpleaded funds the reasonable value of the helium content of the processed gas, the Court then said,

> "We believe that this result is a valid reconciliation of the statutes and a proper determination of the rights of the parties."

It is thus apparent that the right of the Plaintiff as a lessee-producer to recover the value of the helium content of gas produced by it and sold to Defendant, according to the *Northern Natural Gas Company* decision, is not based on statute.[2] Rather, Plaintiff's right as a lessee-producer to recover the value of the helium content of its processed gas appears to be based on principles

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1. Jurisdiction in that case was not based on a federal question under 28 U.S.C.A. § 1331(a). Jurisdiction therein was obtained under the interpleader statutes, 28 U.S.C.A. §§ 1335, 1397 and 2361. *Northern Natural Gas Company* v. *Grounds*, 292 F. Supp. 619 (Kan. 1968), at pp. 637-640. No claim is here made that the instant action is in the nature of interpleader.

2. In the *Northern Natural Gas Company* case, *supra*, our Circuit merely concluded that the Natural Gas Act did not control the price of helium and therefore it was no impediment to a recovery of the reasonable value of helium by its lessee-producers. 441 F. 2d at p. 723. Such a conclusion assumed that the right of recovery exists independently of Federal Statute. The Court pointed out that application of a Government price ceiling to *all* constituents of the natural gas would result in a windfall for the extractors of helium and that a utility rate could be used to obtain a commodity not in the contemplation of the rate. 441 F. 2d at pp. 722-723.

of equity by a reconciliation of federal statutes which did not abrogate existing gas contracts. This is indeed an anomalous situation and has been brought about by the intrusion of the Federal Government into the Natural Gas industry by placing a ceiling on the price of natural gas as produced and at the same time directing the Federal Government to purchase, conserve and store helium and do all of this without abrogating existing gas contracts.

Thus, the Court concludes that Federal question jurisdiction is not present in this case, as required by 28 U.S.C.A. § 1331(a). It may be that defensively the Defendant will assert that their gas contracts do not support Plaintiff's contention made herein, whereupon, Plaintiff will respond with the decision of *Northern Natural Gas Company, supra,* that it is entitled to a recovery for the reasons therein stated. As aforesaid, not only does a judgment of a Federal Court not raise a federal question under 28 U.S.C.A. § 1331(a) but a Plaintiff may not avail itself of Federal question jurisdiction by anticipating a probable defense. *Skelly Oil Company* v. *Phillips Petroleum Company,* 339 U.S. 667, 94 L.Ed. 1194, 70 S.Ct. 876 (1950).

Defendant's Motion to Dismiss is granted and Plaintiff's action is dismissed for want of jurisdiction.

It is so ordered this 15th day of September, 1972.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

(Filed September 15, 1972)

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1973

TEXACO INC., a Corporation,
Plaintiff-Appellant,
v.
PHILLIPS PETROLEUM COMPANY, a Corporation
Defendant-Appellee.

No. 72-1758

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 71-C-167)

Elmer W. Adams (Philip R. Wimbish on the brief) for Plaintiff-Appellant.

Don L. Jemison (Kenneth Heady and Richard B. McDermott on the brief) for Defendant-Appellee.

Before BREITENSTEIN, BARRETT and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The question is whether the complaint of plaintiff-appellant Texaco Inc. states a controversy arising under the laws of the United States. If it does, federal court

jurisdiction lies under 28 U.S.C. § 1331(a). Otherwise, there is no federal jurisdiction. The district court sustained the motion to dismiss of defendant-appellee Phillips Petroleum Company and dismissed the action on the ground that there was no federal question jurisdiction. We reverse.

We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, 10 Cir., 441 F.2d 704, cert. denied 404 U.S. 951, 1063, and 1065. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies. In Consolidated Helium, federal jurisdiction was invoked under the Federal Interpleader Act, 28 U.S.C. § 1335, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402, and 2674, and the Tucker Act, 28 U.S.C. § 1346(a)(2). None of those jurisdictional grounds are found in the case at bar.

Diversity of citizenship is not present. More than the jurisdictional amount is admittedly at stake. The only basis for federal jurisdiction is 28 U.S.C. § 1331(a) which confers jurisdiction when "the matter in controversy * * * arises under the * * * laws * * * of the United States." Phillips says that the complaint presents no more than a simple, common law, contract action and does not pertain to any right or immunity created by any law of the United States.

The complaint alleges that plaintiff, a lessee-producer, and defendant are natural gas companies within the scope of the Natural Gas Act; that plaintiff has made written contracts to sell gas to defendant for movement in interstate commerce; that for several years defendant has sep-

arated out the helium content of the gas and sold it; that defendant has not paid plaintiff for the helium contained in, and separated from, the gas; and that plaintiff has a right under the Natural Gas Act, 15 U.S.C. § 717 et seq., and under § 11 of the Helium Act amendments, 50 U.S.C. § 167i, to be paid for the helium.

It is said in Wright, Fed. Courts 2d H.B., p. 55, that no "clear test has yet been developed to determine which cases 'arise under' the Constitution, laws, or treaties of the United States." The leading case on the subject is Gully v. First National Bank, 299 U.S. 109. The Court recognized these tests, Ibid. at 112-113: (1) a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's cause of action; (2) the right or immunity must be such as will stand or fall on the construction or effect of the federal Constitution or laws; (3) the controversy must be genuine and present; and (4) the controversy must be disclosed on the face of the complaint, unaided by the answer or the petition for removal.

We have recognized and applied the Gully tests in Regents of New Mexico v. Albuquerque Broadcasting Co., 10 Cir., 158 F.2d 900 (jurisdiction upheld in suit asserting rights under Communications Act of 1934 and regulations issued thereunder); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767 (jurisdiction denied in suit for declaration of rights in congressionally appropriated funds for payment of money judgment of the Indian Claims Commission); and Midwestern Developments, Inc. v. City of Tulsa, Oklahoma, 10 Cir., 333 F.2d 1009, cert. denied 379 U.S. 989 (jurisdiction upheld in suit relating to right of way granted under the Enid-Anadarko Act). In Mountain Fuel Supply Company v. Smith, 10 Cir., 471 F.2d 594, a suit involving rights under

land patents granted pursuant to the Act of July 17, 1914, we upheld jurisdiction without discussion of Gully.

In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that "private contract law and the principles applicable thereto are not controlling." 441 F.2d at 722. No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, Ibid. at 723:

> " * * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants."

In holding that it had no jurisdiction, the trial court said that the judgment in Consolidated Helium does not raise a federal question which will support jurisdiction under § 1331(a). We agree that the judgment will not itself support that jurisdiction. See Metcalf v. Watertown, 128 U.S. 586, 588, and Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767, 770.

The trial court went on to say that the Natural Gas Act did not abrogate the contracts and that neither that Act nor the 1960 Helium Act amendments created any right in the plaintiff. In Consolidated Helium we recognized that the Natural Gas Act did not abrogate private rate contracts as such, 441 F.2d at 720, and pointed out that price and other provisions of contracts for the interstate sale of natural gas have largely been nullified by Federal Power Commission regulations and orders. The trial court construed our decision in Consolidated Helium

as permitting recovery by lessee-producers "on principles of equity by a reconciliation of federal statutes which did not abrogate existing gas contracts." We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate. 441 F.2d at 720 and 722-723.

We adhere to our decision in Consolidated Helium. Absent circumstances not present there or disclosed on the record now before us, recovery of the value of helium separated from gas moving interstate can be had only by reconciliation and application of the Natural Gas Act and the 1960 amendments to the Helium Act, not under contract law or principles of equity. We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 1063, and 1065. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

We have here a genuine and present controversy disclosed on the face of the complaint and not asserted in anticipation of any defense. Plaintiff presents a substantial claim resting on a reasonable foundation. The right asserted under federal laws is an essential element of plaintiff's case which must stand or fall on the construction or effect of the federal laws. The tests announced in Gully have all been met.

One further matter should be mentioned. In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium-bearing natural gas

produced by over 500 lessee-producers under thousands of leases. 441 F.2d 710 and 715. The Supreme Court said in Gully, 299 U.S. at 117:

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. * * * To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end."

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe that the federal courts have jurisdiction under 28 U.S.C. § 1331(a).

The judgment is reversed and the case remanded for further proceedings.

(Opinion filed July 13, 1973)

APPENDIX C

No. 72-1758—TEXACO, INC. v. PHILLIPS PETROLEUM COMPANY

DOYLE, Circuit Judge, dissenting:

I respectfully dissent. Although the claim which is here presented bears a relationship to federal law, namely, the Natural Gas Act, 15 U.S.C. § 717 and the Helium Act, 50 U.S.C. § 167, the relationship is not sufficiently close to justify holding that this cause arises under federal law. The claim in question is based on a contract express or implied (in law) and the granting of relief does not require consideration, construction or interpretation of a federal statute. The fact that federal law is indirectly related to the controversy or that federal law may be an insubstantial ingredient of the claim is not sufficient.

The doctrine enunciated by Chief Justice Marshall in Osborne v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204 (1824), has long since been repudiated. *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) by Justice Holmes holding that libel and slander of a patent is lacking in federal jurisdiction since the state law governs and the patent law does not preempt merely because it involves a patent.

A similar result has been enunciated in a case involving the scope of a real estate patent where the dispute concerned accretion in an area bounded by the Mississippi River. Joy v. City of St. Louis, 201 U.S. 332 (1906). Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900), an action to enforce a right arising under a patent issued in connection with a mining claim issued by the Commissioner of the General Land Office, is also illustrative. In

Shulthis v. McDougal, 225 U.S. 561, 569 (1912), the Supreme Court in an often quoted passage stated:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.

Professor Wright in his Law of Federal Courts (2d ed.) § 17 concedes that this area of the law is somewhat vague, but states unequivocally that federal law must be an essential element in the case. He recommends Professor Mishkin's test[1] "that for original federal jurisdiction there must be 'a substantial claim founded directly upon federal law.'" The cases appear to support the concept expounded in this test.

Turning to natural gas cases, we find that jurisdiction has been refused where the subject matter was similar to that in the instant case. *See, e.g.*, Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961), wherein a pipeline company had purchased gas from the petitioners. It was ordered by the Kansas Corporation Commission to pay higher rates. It did so under protest, alleging that since it was subject to Federal Power Commission jurisdiction the Kansas Commission could not exercise jurisdiction over it. The Supreme Court later sustained this contention. 355 U.S. 391. Subsequently, Pan American brought suit in Delaware State Court to recover overpayments. The suppliers filed a petition for a writ of prohibition in the Delaware Supreme Court contending that

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1. Mishkin, The Federal "Question" in the District Courts, 1953, 53 Col. L. Rev. 157, 165, 168.

the action fell within the exclusive jurisdiction of the federal courts under the Natural Gas Act. The Delaware court rejected this contention and the Supreme Court affirmed. The holding of the Supreme Court was that the action was governed by state law, not federal; that determination of the suit did not depend upon federal law. The fact that the prices to be paid were measured by rates filed with or promulgated by the Federal Power Commission did not create a question cognizable in a federal trial court.

The Supreme Court's earlier decision in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), dealt with contracts for the supply of gas reserves for a pipeline. The contracts provided that the supplier could terminate if the purchasers were unable to obtain a certificate of public convenience and necessity from the Federal Power Commission. A conditional certificate was issued. However, the supplier gave notice of termination stating that the certificate was not as contemplated. Suit was brought in federal court seeking a declaratory judgment that the contracts were in effect. The district court and the court of appeals found that the action arose under federal law, but the Supreme Court reversed and ordered that the case be dismissed for lack of federal question jurisdiction. The basis for the Court's decision was that the cause arose under state law. The Court pointed out that the claim did not present in and of itself a federal question involving as it did a question of substantive contract law. The presence of a federal question by way of defense did not suffice.

This court has also reached the same conclusion as was reached by the Supreme Court in *Pan American Petroleum Corp.* This was in Landon v. Northern Natural Gas Co., 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965). It was there stated that the claims involved

were common law claims based on the substantive law of Kansas and were before the court only by reason of diversity jurisdiction.

In view of the foregoing, the case at bar is a simple action in the nature of quasi-contract or *indebitatus assumpsit* which is not dependent on federal law. At most it would call for a reference to rates promulgated by a federal agency. This is not enough of an ingredient to justify federal jurisdiction.

(Dissenting opinion filed July 13, 1973)

APPENDIX D

Text of Sections 4 and 5 of the Natural Gas Act, 52 Stat. 822 as amended, 76 Stat. 72, coded as Section 717c and 717d of Title 15 of the United States Code:

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and

regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not

for a longer period than five months beyond the time when it would otherwise go into effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.